No. 188.

Brief of Rouse & Grant for Appt

Filed Dec. 10, 1897.

DEC 10 18
JAMES H. McKENNE
CL

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

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HENRY W. BENJAMIN, *Appellant*,

versus

THE CITY OF NEW ORLEANS.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF J. D. ROUSE AND WILLIAM GRANT IN BEHALF OF APPELLANT.

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STATEMENT.

The complainant is an alien, the defendant is a municipal corporation created by the law of Louisiana, and as between the parties the case is within the jurisdiction of the United States Circuit Court, where this suit was originally commenced. The allegations of the original bill were believed to be sufficient to show a controversy arising under the Constitution of the United States, making a case for the jurisdiction of the Circuit Court.

The jurisdiction was assailed upon the ground that the case was not one arising under the Constitution or laws of the United States; and also upon the ground that the suit was one by an assignee to recover the contents of choses in

action, without any averment that the assignors thereof were competent to sue thereon in said Circuit Court, if no assignment had been made.

The jurisdiction of the Circuit Court was maintained, and a decree made in favor of the complainant, from which the defendant appealed to the Circuit Court of Appeals, which court certified among others, the jurisdictional questions to this court, such questions briefly stated being (1) whether the case made by the bill was one arising under the Constitution of the United States, and therefore within the jurisdiction of the Circuit Court, without regard to the diverse citizenship of the parties; and (2) whether the suit was one to recover the contents of choses in action by an assignee so as to exclude the jurisdiction of the Circuit Court.

This Court held that the case was not one arising under the Constitution of the United States, so as to give jurisdiction to the Circuit Court, without regard to the diverse citizenship of the parties, and that it was a suit by an assignee to recover the contents of choses in action without any showing that the assignors might have brought suit thereon in the Circuit Court if no assignment had been made, and therefore said court was without jurisdiction (153 U. S. 411).

Upon the receipt of the mandate from this Court, the Circuit Court of Appeals reversed the judgment of the Circuit Court, and ordered that court to dismiss the bill, unless by proper averment and in accordance with the views expressed by this Court the jurisdiction of said Circuit Court should be made affirmatively to appear. The mandate of the Circuit Court of Appeals having been filed in the Circuit Court, the complainant amended his bill, by inserting at the end of the sixteenth paragraph, and before the seventeenth paragraph thereof (see page 6 of record of the present appeal), the following averment, to-wit: "And your orator avers, that all of said persons in whose favor said claims accrued, and to whom said certificates were issued, are now, and were, on the 9th day of February, 1891, citizens respectively of States other than the State of Louisiana, and competent as such citizens to

maintain suit in this Honorable Court against the defendant for the recovery of said indebtedness represented by said certificates, if no assignment or transfer thereof had been made."

The defendant demurred generally and specially to the bill as amended, alleging as special grounds of demurrer that the case is not one of equitable cognizance, "and that the amendment is defective and not sufficient to require this defendant to plead, or answer thereto, it being essential that the amendment should state the names and residences and the citizenship of the persons to whom the warrants and certificates issued and to whom accrued the claims against the Metropolitan Police Board who are averred by the amendment to be now and to have been citizens of States other than Louisiana, * * * * * and whose aforesaid warrants, certificates and claims the amendment alleges the complainant acquired; and said statement, besides being essential as a jurisdictional averment in the bill, is requisite also to apprise defendant of the testimony proposed to be offered, and enable the defendant to controvert by testimony the allegations of citizenship in the vague and general terms of the amendment" (R., p. 9).

The decree upon the demurrer was, that "said demurrer be maintained and the bill of complaint dismissed with costs" (R., p. 11).

The decree was an adjudication upon the merits of the complainant's case, and might be pleaded as *res adjudicata* to a new bill brought by the complainant for the same cause of action.

Aurora City vs. The West, 7 Wall. 99.

Bissell vs. Spring Valley Township, 124 U. S. 225.

Lyon vs. Perin Manufacturing Co., 125 U. S. 698.

The opinion of the Court is no part of the record and it would be no answer to such plea to show the opinion or the reasons for its judgment. In the language of Judge Wallace in Oglesby vs. Attrill, 20 Fed. Rep. 570: "What the Court said is valuable as a contribution to the general fund of legal learning, but if the Court had given very poor reasons for

their conclusions, the effect of the adjudication would have been the same."

We have, therefore, a case in which a jurisdictional question not at issue was involved together with the merits, in which the Court rendered a final decree disposing of the merits of the controversy.

The complainant, therefore, in accordance with the views of this Court, as expressed in the cases of *McLish vs. Roff*, 141 U. S. 661, and *Smith vs. McKay*, 161 U. S. 355, took an appeal to the Circuit Court of Appeals, where the decree was affirmed, upon the ground that the complainant's averment that his assignors were, at the time the suit was brought, citizens respectively of States other than Louisiana, and competent as such citizens to maintain suit in the Circuit Court if no assignment had been made, was insufficient to show jurisdiction; and also held that the opinion of the judge *a quo*, that the case was not one of equitable jurisdiction, was superfluous (R., pp. 22, 74, Fed. R. 417).

The case being one in which the jurisdiction of the Circuit Court was not "dependent *entirely* upon the opposite parties to the suit, or controversy, being aliens and citizens of the United States or citizens of different States," but depended upon the further fact that the assignors of the complainant possessed such citizenship as would have enabled them to bring suit for the recovery of the contents of the same choses in action in said Circuit Court if no assignment had been made, and, therefore, the decree of said Circuit Court of Appeals not being final, the complainant, by appeal, brought his case to this Honorable Court, and made the following—

Assignment of Errors.

First—Said Circuit Court of Appeals erred in holding that, in order to give jurisdiction of complainant's bill to the Circuit Court, it was necessary for the complainant to aver that the citizenship of the assignors of the certificates on which he sues as assignee was such *at the time the assignment was made* as would have enabled them to sue in the Circuit Court if no assignment had been made.

Second—Said Court erred in holding that, in order to show jurisdiction in the Circuit Court in which complainant's suit was brought, it was necessary to set out and aver specially of what particular State each of the several assignors of complainant's certificates were citizens at the time the suit was brought.

Third—That said Court erred in affirming the decree of the Circuit Court dismissing the bill, when it ought to have reversed the decree in all respects and remanded the case with directions to proceed according to law.

ARGUMENT.

I.

We can not understand how the equitable jurisdiction of the Circuit Court, of the case presented by the bill can be doubted. We supposed that this Court settled that question when this case was before it upon certificate from the Circuit Court of Appeals. The discussion was then directed to the question whether or not the equitable case presented by the bill was one arising under the Constitution, so as to give jurisdiction to the Circuit Court, without regard to the diverse citizenship of the parties. In considering this aspect of the case, this Court expressly held that—

" The jurisdiction in equity in this case is found in the inadequacy of the remedy at law, either because the rights claimed can not be enforced at law, or because they could not be administered in that forum. The bill was manifestly framed to bring the case within the class in which receivers are appointed to collect the assets and pay the creditors of a dissolved corporation " (153 U. S. 428), *Broughton vs. Pensacola*, 93 U. S. 266, 268, *and Merriweather vs. Garrett*, 102 U. S. 472, 527, being cited and followed.

Thus admitting the jurisdiction in equity of the case presented by the bill, the argument of the opinion was directed to show that there had been no impairment of the obligation of a contract by the legislation of Louisiana; and that there-

fore there was no constitutional question in the case, authorizing the complainant to invoke the jurisdiction of the Circuit Court *upon that ground*. And this court being "of the opinion that the case made upon the bill and answer did not really and substantially involve a dispute, or controversy, as to the effect or construction of the Constitution, upon the determination of which the result of the suit depended," for that reason denied the jurisdiction of the Circuit Court, and not because the case was one of which a court of equity could not take cognizance.

In New Orleans vs. Gaines' Administrator, 131 U. S. 191, it was held that under the jurisprudence of Louisiana the creditor may exercise the right of action of his debtor, a right analogous to the garnishee, or trustee process in some States, and this right could be enforced in the Federal Court in a suit in equity, on the principle of subrogation. This equitable right was disclosed by the bill. The averments of the bill are: That the several defendants are liable to the Police Board for balances due upon the apportionments for police expenses, for which they were respectively liable to said Police Board; that said board had no other assets at the time of its dissolution; that the just proportion due by each of the defendants should be adjusted; that the liabilities of the said Board of Police should be fixed and determined and paid out of said assets, and that if the same exceeded the liabilities of the board, as alleged, said defendants should be required to pay their *pro rata* shares thereof. It was also averred, that because the city of New Orleans had been compelled to receive police warrants in payment of taxes, she had thus paid more than her just proportion of police expenses (seventeenth paragraph of the bill, R., p. 6).

These facts show the impossibility of determining the *pro rata* liabilities of the several corporations embraced within the police district, to the Board of Police, in an action at law. as well also the impossibility of the liability to any particular creditor of the Police Board, being determined in an action at law, against the city of New Orleans (or any other defendant) in a suit for the recovery of the amount due him;

and therefore that the complainant can have no relief except in a court of equity.

The Metropolitan Police District, over which the Metropolitan Board had jurisdiction, included not only the territory embraced in the city of New Orleans, but also that embraced in the parishes of St. Bernard, Jefferson and the city of Kenner, as well. Therefore, it will not do to say that when the Metropolitan Board of Police was abolished, the city of New Orleans became its successor. The repealing act (La. Acts, extra session 1877, p. 57) made no provision for transfer of its power, in part or in whole, to any of the municipal corporations over which it had jurisdiction, and it might as well be said that the city of Kenner, or the parish of Jefferson, or the parish of St. Bernard, was the successor of the board, and that an action at law would lie against either of them for its debts, as to say that an action at law against the city of New Orleans would lie therefor. The necessity of joining all the corporations as defendants in one suit in equity, to determine their respective liabilities to the board and to provide for their apportionment thereof to the whole debt, in such proceeding is manifest.

That the facts stated in the bill show that the complainant is entitled to relief seems to us so plain as to require no discussion, yet the judgment upon the demurrer determines the contrary, which we believe to be manifest error.

II.

The complainant being an alien, and the defendant a citizen of the State of Louisiana, the case is within the jurisdiction of the Circuit Court by reason of the diverse citizenship of the parties, unless it is within one of the exceptions named in the judiciary act. The limitation upon the exercise of jurisdiction in certain cases is as follows:

"Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such

instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such Court to recover the said contents if no assignment or transfer had been made" (25 Stat. at Large, 434).

The amendment to the bill avers that the assignors of the certificates sued upon were, at the time the suit was brought as well as when the amendment was filed, citizens respectively of States other than the State of Louisiana, and competent, as such citizens, to maintain suit against the defendant for the recovery of said indebtedness if no assignment or transfer thereof had been made. This brings the case within the very letter of the statute. The opinion of the Circuit Court of Appeals that the assignors could not have sued in the Circuit Court unless they had been, *at the time of the transfer*, citizens of other States is manifest error. It has been so often held that the jurisdiction of the Court in such cases is determined by the conditions existing at the time the suit was brought that it is unnecessary to cite authorities to that effect.

It was asserted and maintained in the court below, that in order to bring the case within the jurisdiction of the Circuit Court, it was necessary to set out and aver specially the citizenship of each and every assignor of the certificates sued upon. We know of no law, or decision of any court, requiring such particularity of averment, and none has been pointed out. The averment of the bill, as amended, clearly makes a case within the jurisdiction of the court. If the defendant desired to join issue on the averment of the citizenship of the assignors of the claims sued upon, it is possible that, by proper pleading, he might have required such citizenship to be specifically set out and averred; but this we do not admit. While it is customary, and perhaps proper, to aver specifically the citizenship of *the parties* to a suit in the Circuit Court, the object of thus pleading is to enable the defendant to join issue upon the averment of citizenship of either the plaintiff or defendant, and try the question of jurisdiction upon plea in abatement in the first instance; and if the plea be maintained, avoid other defence. But the averment of the amended bill can not be met by a plea in abatement, becaus

the jurisdiction of the court is apparent upon the face of the bill from the averment of diverse citizenship, which is only aided by the amendment, showing that the assignors of the certificates sued upon had also such citizenship as would have enabled them to sue in the Circuit Court upon the same obligations if no assignment had been made. Whether or not such assignors possessed the citizenship averred in the amended bill can only be tried with the other issues in the case after the same shall be joined by plea or answer to the bill, as amended; and if denied, the burden of proof will be upon the complainant to show such citizenship, when the instruments and assigments thereof are offered under the pleadings.

Bradley vs. Rhine's Administrators, 8 Wall. 393.

If the citizenship of the assignors in any particular State or States had been sufficiently averred, the complainant would be bound to do no more than establish that they were citizens of some of the States other than the State of Louisiana. Thus, if the averment had been, that the assignors were citizens of Alabama, and the proof should show that they were citizens of Mississippi, or New York, it would not oust the jurisdiction. The complainant might well be mistaken as to the particular State of which his assignor was a citizen. The question therefore raised by the demurrer, is not the sufficiency of the averment to show jurisdiction in the Circuit Court, but whether or not the defendant is entitled to a more specific averment of the citizenship of the assignors before pleading to the bill. This is a new question, and it must be decided on principle without the aid of authorities.

But as the status of the various assignors is a fact which must be established by the complainant, like any other issuable fact in the case, the averment of the bill is sufficient to let in proof, especially as from the character and nature of the fact the defendant is not called upon to meet it by any special plea, but may have full benefit of the defence by disclaiming knowledge and requiring proof. The issue is collateral to the merits of the case, and the defendant can not require a mere incident involved in a suit, which by his de-

murrer he admits to be true, to be set out with useless particularity. Moreover, the true issue is not whether the assignors were citizens of a particular State—it is enough that they were, at the time the bill was filed, citizens of any other State than the State of Louisiana. It has been held that "if an alien should sue a citizen, and should omit to state the character of the parties in the bill; though the Court could not exercise its jurisdiction while this defect in the bill remained; yet it might, as is every day's practice, be corrected at any time before the hearing, and the Court would not hesitate to decree in the cause."

Conolly et al. vs. Taylor et al., 2 Peters, 565.

And see Waters vs. Barril, 131 U. S. App. LXXXIV.

So it is not essential to the maintenance of the jurisdiction of the Circuit Court, in a case arising under the Constitution, that the pleadings should refer in words to the particular clause of the Constitution relied on, but it is sufficient to show that the suit is one of which the Circuit Court is entitled to take cognizance.

Hanford vs. Davies, 163 U. S. 280.

It has been repeatedly held by this Court that a suit can not be properly dismissed by the Circuit Court of the United States, as not substantially involving a controversy within the jurisdiction of the Court, unless the facts, when made to appear on the record, create a legal certainty of that conclusion.

Barry vs. Edmonds, 116 U. S. 550.

Deputron vs. Young, 134 U. S. 252.

It follows from this that a case shown to be within the jurisdiction of the Court, although the jurisdictional fact be defectively stated, can not be rightfully dismissed for want of jurisdiction. As stated by Chief Justice Marshall in Conolly vs. Taylor, *supra*, the averment, if defective, may be corrected at any time before the hearing.

The Circuit Court in disposing of the case under the pleadings, even if it had dismissed the bill on the special grounds set up in the demurrer that the averments of the bill did not specifically name the particular State of which each assignor

was a citizen, did not in fact decide a jurisdictional question, which could have been certified under the fifth section of the act of 1891, for the effect of the special demurrer was to call for a bill of particulars, which is a question of pleading and not of jurisdiction. The defendant called for this specific statement so that he might plead to the jurisdiction or not, as he might elect. As the decree of the Circuit Court disposed finally of the merits, and incidentally only of a question of pleading, it is clear that there was no jurisdictional question which could be taken up under the sixth section. The case here therefore is one in which the jurisdiction of the Circuit Court did not depend entirely on the citizenship of the parties to the record, and in which that Court did not decide the other question upon which it also depended.

The question being in the case, but not decided, the case was rightfully appealed to this Court under Sec. 6 of the Act of March 3, 1891.

The statement accompanying the questions heretofore certified, that the assignors of the certificates "*were* citizens of Louisiana" (153 U. S. 417), led this Court to say in its opinion (*Ibid.*, p. 435) that it affirmatively appeared that the suit could not have been maintained by them if no assignment had been made.

The language of the certificate relates to the past, and the fact that they *were* once citizens of Louisiana does not conclude the complainant from showing *that at the time the suit was brought* they were citizens of other States, as averred by the amendment to the bill.

Wherefore the appellant prays that the decree appealed from be reversed and the cause remanded to the Circuit Court to be proceeded with according to law.

Respectfully submitted,

J. D. ROUSE,
WM. GRANT,
Solicitors for Appellant.